IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION



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| MARK NEWBY, *et al.*, | § | |
| | § | |
| Plaintiffs, | § | |
| | § | |
| v. | § | Civil Action No. H-01-3624 |
| | § | Consolidated Lead Case |
| ENRON CORP., *et al.*, | § | |
| | § | |
| Defendants. | § | CLASS ACTION |

**REBECCA MARK-JUSBASCHE'S RESPONSE TO PLAINTIFF AMALGAMATED BANK'S THIRD SUPPLEMENTAL BRIEF AND OPPOSITION TO APPLICATION FOR PARTICULARIZED EXPEDITED DISCOVERY**

**GRAVES, DOUGHERTY, HEARON & MOODY, P.C.**
John J. McKetta, III
State Bar No. 13711500
Federal ID No. 29895
Attorney in Charge
Helen Currie Foster
State Bar No. 24008379
Federal ID No. 29894
515 Congress Avenue, Suite 2300
P.O. Box 98
Austin, Texas 78767
(512) 480-5600
(512) 478-1976 Telecopy
**ATTORNEYS FOR DEFENDANT REBECCA MARK-JUSBASCHE**

FEBRUARY 8, 2002

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TO THE HONORABLE JUDGE OF THE UNITED STATES DISTRICT COURT:

Rebecca Mark-Jusbasche ("Ms. Mark-Jusbasche"), one of the defendants in the above-styled and numbered cause, respectfully submits this her Response to Plaintiff Amalgamated Bank's Third Supplemental Brief ("Amalgamated Brief") and her Opposition to Amalgamated's Application for Particularized Expedited Discovery.

## I. INTRODUCTION

In some countries, upon mere filing of a lawsuit, a defendant's assets can be seized and frozen, sometimes for years, before the factfinder ever reaches any determination as to whether the defendant was, or was not, liable. Such countries do not confer on individuals the due process protections for liberty and property established by the United States Constitution and our system of law. Amalgamated's initial Application for TRO, seeking expedited discovery and an asset freeze, made no pretense of meeting evidentiary standards required by due process. While the current effort is ostensibly a separate request that the Court lift the discovery stay under the Private Securities Litigation Reform Act (PSLRA) to permit "particularized discovery,"[1] Amalgamated's primary goal clearly remains pre-judgment asset seizure. Amalgamated repeatedly urges that it needs discovery in order to get an asset freeze. *See, e.g.,* Amalgamated Brief at 1 ("limited discovery is critical to

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[1] In any private action arising under this subchapter, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds, upon the motion of any party, that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

U.S.C. § 77z-1(b)(1); *similarly, see* 15 U.S.C. § 78u-4(b)(3)(B). The 1995 Private Securities Litigation Reform Act (PSLRA) amended both the Securities Act of 1933 ("Securities Act"), and the Securities Exchange Act of 1934 ("Exchange Act"). The discovery stay was added to both as part of the Private Securities Litigation section. *See* Section 27 of the Securities Act (15 U.S.C. § 77z-1) and Section 21D of the Exchange Act (15 U.S.C. § 78u-4(b)(3)(B)).

plaintiffs' ability *to seek equitable relief*") and 10 ("this discovery is necessary to provide the Court with a more complete record on which to consider plaintiffs' application for injunctive relief.").

Amalgamated's real goal, in short, is not "particularized discovery" necessary to preserve evidence or prevent undue prejudice under the PSLRA, but another shot at the asset freeze already denied by the Court. Consequently it is appropriate to recall the due process standards which Amalgamated has already failed to meet.[2]

As to the PSLRA stay, the Court should deny Amalgamated's request that it lift the statutory discovery stay as to defendant Rebecca Mark-Jusbasche because Amalgamated has failed to show either that (1) the discovery stay must be lifted as to her to preserve evidence; or (2) the discovery stay must be lifted as to her to prevent undue prejudice to Amalgamated.

## II. AMALGAMATED STILL HAS MADE NO PARTICULARIZED SHOWING AS TO DEFENDANT MARK-JUSBASCHE WARRANTING THE UNPARTICULARIZED DISCOVERY SOUGHT.

In opposing Amalgamated's Application for Temporary Restraining Order, Accounting and Discovery on December 7, 2000, Defendant Mark-Jusbasche noted that because of the total absence of any individualized allegation as to her, the TRO Application facially lacked merit, lacked supporting evidence, and sought to obtain a prejudgment seizure of assets without compliance with federal or state-law requirements. December 7 Response.

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[2]Amalgamated failed to make any allegations specifying any misconduct on the part of Rebecca Mark-Jusbasche. It also failed to show irreparable injury as required by Fed. R. Civ. P. 65, offering only conclusory allegations in place of any competent proof. Amalgamated similarly failed to meet the evidentiary burden for the extraordinary attachment remedies sought, as required by Fed. R. Civ. P. 64 and Texas law incorporated under that rule. Amalgamated failed even to offer the required bond. *See* Rebecca Mark-Jusbasche's Response in Opposition to Plaintiffs' Ex Parte Application for Temporary Restraining Order, Accounting, and Discovery, filed December 7, 2001 ("December 7 Response").

Precisely because Amalgamated failed to make and support specific individualized allegations, Judge Rosenthal denied the TRO. The Court concluded that "without allegations or evidence that each, or any, defendant has, or is likely to, conceal the stock sales proceeds or profits or place them beyond reach, absent immediate judicial intervention," the "present record does not provide a sufficient basis for the issuance of a temporary restraining order freezing the proceeds of each individual defendant's sales of Enron stock." Order of January 9, 2002 ("January 9 Order"), at 7, 2. Judge Rosenthal noted that where such prejudgment asset-freezing injunctions have been granted by other courts,

> [T]he courts have been presented with allegations and evidence showing that the defendants were concealing assets, were transferring them so as to place them out of the reach of post-judgment collection, or were dissipating the assets. *See, e.g., Rahman*, 198 F.3d at 493 (uncontradicted allegations that defendants had transferred assets to Caribbean Island and were selling main assets of the corporation); *Deckert*, 311 U.S. at 291 (defendants insolvent and giving preference to foreign creditors seeking payment); *Republic of Panama v. Air Panama Internacional, S.A.*, 745 F.Supp. 669 (S.D. Fla. 1988) (defendants attempting to transfer assets of national airline to illegitimate government of Panama, putting the assets outside the reach of the court); *Republic of the Philippines v. Marcos*, 862 F.2d 1355 (9th Cir. 1988) (upholding asset freeze based on allegations that defendants had internationally transferred personal assets and had used false identities to transfer assets to a Liechtenstein trust, using Swiss banks, for their benefit).

January 9 Order at 38-39. The Court clarified that Amalgamated must make the required showing as to *each individual defendant*: "Amalgamated must show that each defendant is likely to dissipate the assets that may satisfy the equitable remedies Amalgamated has asserted, absent intervention by this court." *Id.*

Two months later, nothing has changed. Despite the clear road map provided in the January 9 Order, despite Judge Rosenthal's explicit identification of the type of specific individualized allegations required, and even with the opportunity to file an additional brief on its request for a lift

of the PSLRA discovery stay, Amalgamated continues to ignore specificity in favor of generalized speculation. Amalgamated still has failed to meet its burden.

### A. Amalgamated still provides no specific allegation warranting expedited discovery from Defendant Mark-Jusbasche.

As to Defendant Rebecca Mark-Jusbasche, Amalgamated again fails to make any specific allegations that discovery from Ms. Mark-Jusbasche is necessary to preserve evidence, or that without the requested discovery from Ms. Mark-Jusbasche, Amalgamated will suffer "undue prejudice."

The only reference to Ms. Mark-Jusbasche, other than that she exercised stock options awarded by her employer (as publicly reported), is buried in a footnote in Amalgamated's brief. Amalgamated discloses that its "investigation" has "uncovered" the fact that Rebecca Mark-Jusbasche was a director of Azurix. Amalgamated Brief, n.6. Such information hardly required substantial investigation to be "uncovered." **Azurix was a publicly traded corporation**, whose directors were readily determined from public filings such as the corporation's 1999 Form 10-K. Azurix's Form 10-K was duly filed with the Securities Exchange Commission and is globally available online.[3] Since Amalgamated alleges that Enron was comprised of "illicit off-shore partnerships controlled by the Individual Defendants," presumably Amalgamated hopes to tar Azurix with that brush. The Form 10-K clearly shows Azurix as a Delaware corporation – hardly an "off-shore partnership."

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[3]The Azurix Form 10-K is accessible via internet as SEC EDGAR Submission 0000950129-00-001509, at http://www.sec.gov/Archives/edgar/...05/0000950129-00-001509-index.html.

This single reference to directorship of a publicly traded Delaware corporation is, aside from the listing of her exercise of employment-granted stock options, the *only* reference to Defendant Mark-Jusbasche in the Amalgamated Brief or exhibits. Once again, as in the Application for TRO, Amalgamated provides no individualized allegation about her that could conceivably justify the intrusive blanket discovery sought.[4]

**B. Amalgamated provides only generalized speculative innuendo – not specifics.**

While claiming its "investigation" has determined that certain Individual Defendants are "intimately involved in the off-shore partnerships," Amalgamated does not share any identifying information with the Court nor tailor or limit its discovery requests in any way to reflect this supposed "investigation." Similarly, Amalgamated urges that because of document destruction by Arthur Andersen and by Enron Corporation in fall-winter 2001, "particularized discovery should immediately ensue" against all individual defendants. Amalgamated Brief at 2. This is illogical, irrelevant and egregiously improper: there is no hint of similar activity by Rebecca Mark-Jusbasche, whose employment and director role **terminated in August 2000–nineteen months ago.** *See* Affidavit of Rebecca Mark-Jusbasche, filed December 7, 2001, in opposition to the Application for TRO.

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[4]The only individual defendants as to whom Amalgamated makes any specific and substantive allegations are Kenneth Lay, Jeffrey Skilling, Andy Fastow and Lou Pai. (*See, e.g.*, Amalgamated Brief at 4, alleging that Lay, Skilling, Fastow and Pai used complex derivatives to "monetize" the Enron securities, and Exhibit 6 at 1, repeating those allegations.) Even as to these four specifically identified defendants, there is no allegation that discovery is necessary "to preserve evidence." Indeed, Amalgamated confesses as much in the affidavit of one of its lawyers, Francis P. Karam, who essentially admits Amalgamated has no such knowledge: "Plaintiffs seek discovery sufficient to allow them to determine whether each defendant has or is likely to (i) conceal the proceeds of their inside stock or derivative sales, or (ii) place them beyond judicial reach." Amalgamated Brief, Exhibit 6, at 1.

### C. The intrusive, unparticularized, blanket discovery sought by Amalgamated is unwarranted as to Defendant Mark-Jusbasche.

With no evidence of any specific threat, Amalgamated directs breathtakingly broad and intrusive identical interrogatories and requests for production to all 29 individual defendants. *See* Exhibit 9 and Exhibit 10 to Amalgamated Brief. The discovery requests are far, far broader than the original requests submitted with the Application for TRO. For example, Amalgamated now demands that the individuals disclose information about every bank account, brokerage account, trust account or any other kind of account they or their current or former spouses have, disclose every professional whom they or their current or former spouse have consulted since 1990 about a variety of matters, and disclose the personal tax returns and related schedules for themselves, their current or former spouse and minor children, since 1997. Amalgamated now demands that the individual defendants identify all compensation ever received from Enron or its affiliates, including salary and bonuses, identify every grant or exercise of every option and every stock trade of any Enron security, and describe the full utilization of any proceeds. Amalgamated now demands that the individual defendants disclose all records (including partnership agreements, bank statements, signature cards, and more) for any private partnership, corporation, trust or other entity in which they have been an officer, director, partner, limited partner, trustee, or officer, and that they disclose safe deposit boxes, storage facilities or third-party trusts as to which the defendant, current or former spouse, and minor children have any involvement. The list goes on and on.

These are not "particularized" requests: they are "an open-ended, boundless universe of discovery." *Mishkin v. Ageloff*, 220 B.R. 784, 793 (S.D.N.Y. 1998) (denying bankruptcy trustee's discovery request as failing to satisfy "particularized discovery" requirement). *See also Faulkner*

*v. Verizon Corp.*, 156 F.Supp.2d 384, 404 (S.D.N.Y. 2001), holding that the plaintiffs' extensive document requests failed to satisfy their threshold burden of seeking "particularized discovery." Amalgamated's requests are far broader than those rejected in *Faulkner*, where plaintiffs sought documents relating to the term "material adverse effect," communications between defendant and its bankers with respect to financing, and documents relating to balance sheets, financial forecasts and income statements.

With no allegation other than that Rebecca Mark-Jusbasche was a director of a publicly held Delaware corporation and that she exercised employer-awarded stock options, [5] Amalgamated seeks improper and invasive pre-judgment discovery of Ms. Mark-Jusbasche's personal records and those of her husband and minor children. Amalgamated makes this demand without any finding of liability, and without a single individualized factual allegation that could conceivably support depriving Ms. Mark-Jusbasche of the statutory protection of the PSLRA discovery stay. This is precisely the abusive fishing expedition that impelled Congress to require a discovery stay in the PSLRA in the first place.

## III. AMALGAMATED HAS FAILED ENTIRELY TO SHOW THAT PARTICULARIZED DISCOVERY AS TO REBECCA MARK-JUSBASCHE IS NECESSARY EITHER TO PRESERVE EVIDENCE OR PREVENT UNDUE PREJUDICE.

"The PSLRA's discovery stay is applicable unless Plaintiffs can demonstrate that particularized discovery is necessary to preserve evidence or that particularized discovery is necessary to prevent undue prejudice. 15 U.S.C. § 78u-4(b)(3)(B)." *In re CFS-Related Securities*

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[5] Amalgamated's sworn application for TRO complains of stock options exercised by Rebecca Mark-Jusbache from February 1999 to May 2000. Rebecca Mark-Jusbache's employment terminated in August 2000.

*Fraud Litigation AUSA v. Bartmann*, 2001 WL 1682815 (N.D.Okla. 2001). Amalgamated has not met its burden of showing that particularized discovery is necessary on either score.

### A. Plaintiff has failed to show that particularized discovery from Defendant Mark-Jusbasche is necessary *to preserve evidence*.

Amalgamated has "not demonstrated any particular threat that evidence would be lost or destroyed if they are not permitted to engage in discovery now." *In re CFS-Related Securities Fraud Litigation AUSA v. Bartmann, supra.* Completely absent from the Brief or exhibits is any allegation that particularized discovery is necessary to preserve evidence as to Defendant Mark-Jusbasche. The reference to her status as former director of a publicly-held corporation does not constitute a "particular threat" requiring discovery in order to preserve evidence as to her. Document destruction in fall and winter 2001 - 02 by defendants Arthur Andersen and Enron Corporation cannot constitute a "particular threat" requiring discovery in order to preserve evidence as to her.[6] This is particularly so where Defendant Mark-Jusbasche's employment and directorship were terminated more than a year earlier, in August 2000.[7]

To permit discovery given Amalgamated's evidentiary default would contravene Congress's intent to remedy excessive discovery in securities lawsuits[8] by including a discovery stay within the PSLRA. *S. G. Cowen Secs. Corp. v. United States Dist. Court for the N. Dist. of California,* 189 F.3d 909, 911 (9th Cir. 1999). Congressional intent is clear from the Senate Report. The only

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[6]The Court has addressed Andersen's actions. Order of January 23, 2002, requiring reporting, retrieval and preservation of evidence and permitting limited depositions of six persons.

[7]Affidavit of Rebecca Mark-Jusbasche, filed December 7, 2001.

[8] Congress heard testimony that "discovery costs account for roughly 80% of total litigation costs in securities fraud cases." Testimony of former SEC Commissioner J. Carter Beese, Jr., quoted in S. REP. NO. 104-98, June 19, 1995, *reprinted in* 1995 U.S.C.C.A.N. 679, 693.

example Congress gave where discovery is "necessary to preserve evidence" is the "terminal illness of an important witness," and even then discovery remains discretionary and its scope limited:

> Courts should stay all discovery pending a ruling on a motion to dismiss a securities class action, except in the exceptional circumstance where particularized discovery is necessary to preserve evidence or to prevent undue prejudice to a party. The Committee recognizes, for example, that a motion to dismiss may remain pending for a period of time, and that the terminal illness of an important witness may necessitate the deposition of the witness prior to ruling on the motion to dismiss.

S. REP. NO. 104-98, June 19, 1995, *reprinted in* 1995 U.S.C.C.A.N. 679, 693.

Congress itself carefully set the checks and balances of the PSLRA by including a preservation of evidence requirement "in recognition that 'the imposition of a stay of discovery may increase the likelihood that relevant evidence may be lost.'"[9] *In re Grand Casinos, Inc. Secs. Lit.*, 988 F.Supp. 1270, 1271 (D.Minn. 1997) (quoting S. REP. NO. 104-98, at 14 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 693).[10]

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[9]This provision mandates that:

> During the pendency of any stay of discovery pursuant to this paragraph, unless otherwise ordered by the court, any party to the action with actual notice of the allegations contained in the complaint shall treat all documents, data compilations (including electronically recorded or stored data), and tangible objects that are in the custody or control of such person and that are relevant to the allegations, as if they were the subject of a continuing request for production of documents from an opposing party under the Federal Rules of Civil Procedure.

15 U.S.C. § 78-u-4(b)(3)(C)(i). The statute provides for the possibility of court-ordered sanctions for a party's "willful failure" to comply with the duty to preserve relevant evidence. *Id.* § 78u-4(b)(3)(C)(ii).

[10]"Because the imposition of a stay of discovery may increase the likelihood that relevant evidence may be lost, the Committee makes it unlawful for any person, upon receiving actual notice that names that person as a defendant, to destroy or otherwise alter relevant evidence." S. REP. NO. 104-98, June 19, 1995, *reprinted in* 1995 U.S.C.C.A.N. 679, 693.

To disturb the balance set by Congress, and deprive a defendant of the statutory protection of the PSLRA, Amalgamated must provide specifics, not speculation or innuendo:

> Absent a showing that defendants are not acting in accordance with their statutory duty, the PSLRA's preservation provision should be sufficient to ensure the preservation of relevant evidence in the defendants' custody or control. *See In re Grand Casinos, Inc. Secs. Lit.,* 988 F.Supp. at 1273 (denying request for preservation order as to evidence possessed by parties because "the preservation of evidence in the possession of the parties is statutorily automatic").

*In re Tyco International, Ltd. Securities litigation*, 2000 WL 33654141, *2 (D.N.H. 2000) (refusing to enter a preservation order against defendants because it "would either unnecessarily duplicate or improperly alter the obligations created under the PSLRA.").

Amalgamated has failed to demonstrate that any additional measures, let alone the unparticularized discovery sought here, are needed to preserve evidence ***as to Rebecca Mark-Jusbasche***.

**B. Amalgamated has failed to establish that without particularized discovery from Rebecca Mark-Jusbasche, Amalgamated will suffer undue prejudice.**

As to the second ground for lifting the PSLRA discovery stay, "to prevent undue prejudice to that party," Amalgamated has made no showing at all that it will suffer undue prejudice absent lifting of the discovery stay as to Rebecca Mark-Jusbasche. Like the plaintiff in *In re CFS-Related Securities, supra*, Amalgamated offers only speculation. Thus Amalgamated asserts that "insider-trading proceeds ... *may* be secreted in one of many off-shore tax havens," or *may* have received proceeds from leveraged "derivative" trading. Amalgamated Brief at 1, Exhibit 6 at 1 (emphasis added).

Speculation cannot serve to establish undue prejudice, as cases make clear:

> Plaintiffs...argue that during any delay, evidence will invariably be lost, advertently or inadvertently. Plaintiffs argue that these concerns are particularly acute in this litigation because most of the evidence of alleged fraud is in the custody of the defendants or third parties over whom they have no control. The Court finds that *these types of wholly speculative assertions as to the risk of losing evidence are not sufficient* to establish undue prejudice within the meaning of §78u-4(b)(3)(B)...[citation omitted]. *Plaintiffs have not demonstrated a specific instance in which the loss of evidence is imminent* as opposed to merely speculative.

*In re CFS-Related Securities, supra* (emphasis added). *See also In re Rational Software Sec. Lit.*, 28 F.Supp.2d 562, 566 (N.D.Cal. 1998) ("If the discovery restrictions of the Reform Act are to have any meaning, a plaintiff must be required to allege more than a vague possibility that a defendant might have committed fraudulent acts which will be shielded in the absence of discovery"); and *In re Fluor Corp. Sec. Lit.*, 1999 WL 817206, *3 (C.D.Cal. 1999) (refusing to lift stay where plaintiffs failed to provide "evidence" or any credible showing that discovery was necessary to preserve evidence beyond allegations of possible loss or destruction).

### C. Amalgamated has failed to show that the PSLRA's preservation provision is insufficient to maintain the *status quo*.

The PSLRA's discovery stay and preservation requirement operate in tandem to preserve the status quo, pending a judicial determination of the legal sufficiency of the complaint. *In re Grand Casinos, Inc. Secs. Lit.*, 988 F.Supp. 1270, 1272 (D.Minn. 1997). Absent any showing that Defendant Mark-Jusbasche is not "acting in accordance with [her] statutory duty," not even a preservation order should issue – much less the unrestricted, unparticularized, intrusive discovery sought by Amalgamated. *In re Tyco Securities Litigation, supra.*

**D. Amalgamated cannot demand discovery in order to gather facts to support its request for discovery.**

Amalgamated actually admits it lacks the evidence that is required before the Court will lift the PSLRA stay. One of its lawyers states, "Plaintiffs seek discovery *sufficient to allow them to determine whether each defendant has or is likely to* (i) conceal the proceeds of their insider stock or derivative sales, or (ii) place them beyond judicial reach." Affidavit of Francis P. Karam, Exhibit 6 (emphasis added). This admission alone requires denial of the requested discovery.

Amalgamated may not base its need for discovery on the need to gather facts sufficient to support its complaint:

> [A]s a matter of law, failure to muster facts sufficient to meet the Act's pleading requirements cannot constitute the requisite "undue prejudice" to the plaintiff justifying a lift of discovery stay under § 78u-4(b)(3)(B). To so hold would contravene the purpose of the Act's heightened pleading requirements.

*S.G. Cowen Sec. Corp. v. United States Dist. Court for the N. Dist. of Cal.*, 189 F.3d 909, 912-13 (9th Cir. 1999); *see also Medhekar v. United States Dist.* Ct., 99 F.3d 325, 328 (9th Cir. 1996) ("Congress clearly intended that complaints in these securities actions should stand or fall based on the actual knowledge of the plaintiffs rather than information produced by the defendants after the action has been filed."); *Faulkner v. Verizon Communications Inc., supra,* 156 F.Supp.2d at 403. Similarly, Amalgamated cannot claim it needs discovery so that it can show it needs discovery. *In re CFS-Related Securities, supra; In re Rational Software Sec. Lit., supra.*

**E. Applicable case law requires denial of Amalgamated's discovery demand.**

Since enactment of the PSLRA, courts have respected the clear expression of Congressional intent that *all discovery be stayed* in a private securities action until the court has ruled on the sufficiency of the complaint. "[I]t is clear that the Congress intended that the Private Securities

Litigation Reform Act limit abusive discovery and prevent "fishing expedition" lawsuits." *Medical Imaging Centers of America, Inc. v. Lichtenstein*, 1996 WL 156926, *2 (S.D.Cal. 1996) (denying plaintiff's request for lift of discovery stay for failure to establish "undue prejudice"), *aff'd*, 917 F.Supp. 717 (S.D.Cal. 1996); *Powers v. Eichen*, 961 F.Supp. 233, 235 (S.D.Cal. 1997) ("the legislative history indicates that the Reform Act was passed to address widespread abuse of the securities laws by overzealous attorneys and investors."). Thus courts have held that the stay begins prior to actual filing of a motion to dismiss, and extends during reconsideration of a dismissal decision: "If the Reform Act was read more narrowly, defendants would be afforded very little of the protection that Congress intended in passing the Reform Act." *Powers*, *supra,* at 235 (declining to lift stay pending decision on motion for reconsideration).

**F. Amalgamated's case law fails to support its discovery demand.**

Amalgamated cites no post-PSLRA case law which supports the breathtakingly intrusive discovery it asks this Court to approve.[11] For instance, *Medical Imaging Centers v. Lichtenstein*, 917 F.Supp. 717 (S.D.Cal. 1996), cited by Amalgamated for a definition of "undue prejudice" as something less than irreparable harm, actually affirmed the magistrate judge's *denial* of the requested expedited discovery, despite plaintiff's complaint that without such discovery its entire derivative case might be *dismissed*. In affirming, the district court expressly noted that the appellant "would have an adequate opportunity, following a favorable resolution of the Motion to Dismiss, to

[11]Amalgamated cites several pre-PSLRA cases, which are inapposite to the current discovery demand and are not discussed here. *See*, *e.g.,* cases cited in Amalgamated Brief, n. 25 (all pre-PSLRA).

undertake adequate discovery if it were warranted." *Id.*, n.3. That principle also applies to Amalgamated.

Amalgamated relies heavily on *Vacold LLC and Immunotherapy, Inc. v. Cerami, et al.*, 2001 WL 167704 (S.D.N.Y. 2001). Amalgamated Brief at 7. However, *Vacold* did not permit the type of intrusive pre-judgment discovery of individual defendants' assets that Amalgamated seeks. The court permitted discovery on one "narrow issue" which the court needed in order to decide defendants' motion to dismiss: the date of the defendants' financing agreement. This date would determine whether or not the alleged misrepresentation occurred before or after plaintiffs' purchase, i.e., whether it was actionable. *Id., *4.*

Amalgamated cites *In re WebSecure, Inc.*, 1997 WL 770414 (D.Mass. 1997), as supporting expedited discovery. Notably, the only discovery permitted in *WebSecure* was limited discovery from the defendant company as to its business plan and how its IPO proceeds were being spent. The judge did not lift the stay as to other potentially liable defendants, including individual directors of WebSecure and its institutional underwriters. *Id.*, *4. *WebSecure* does not support the invasive pre-judgment asset discovery sought here.

Finally, Amalgamated argues that "in similar circumstances" courts have upheld expedited discovery in advance of a scheduled preliminary injunction hearing (thus underscoring its desire for another bite at an "asset freeze"). Amalgamated Brief at 7, and n.29-30. However, the cited cases do not involve "similar circumstances," and have nothing to do with the PSLRA's statutory stay.[12]

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[12]For instance, the cases cited by Amalgamated in n.29 and n. 30 included a trade secret case, *FMC Corp. v. Varco Int'l, Inc.*, 677 F.2d 500 (5th Cir. 1982); suit on a promissory note, *Citizens Sav. Bank v. Gli Tech. Servs.*, 1996 U.S. Dist. LEXIS 19128 (E.D.La. Dec. 20, 1996); a shareholder (continued...)

## IV. CONCLUSION

Amalgamated does not offer so much as a rumor which would support any lift of the PSLRA stay as to Rebecca Mark-Jusbasche. Amalgamated makes no reference to even a single fact which could conceivably show that "particularized discovery" is "necessary" as to Ms. Mark-Jusbasche in order to preserve evidence, or in order to prevent undue prejudice to Amalgamated.

Moreover, Amalgamated fails the threshold requirement of "particularized discovery." Instead, Amalgamated demands intrusive, broad-based, blanket discovery – an impermissible "open-ended, boundless universe of discovery." *Mishkin, supra, 220 B.R. at 793*. Amalgamated demands discovery that it would not be entitled to unless it not only survived a motion to dismiss its complaint, but actually won judgments against each defendant. Indeed, much of this discovery would not be permitted even as post-judgment discovery.

Amalgamated has failed to comply with detailed requirements for pleading and proof imposed under the PSLRA. Its request for lift of the statutory discovery stay is facially meritless and

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[12](...continued)
tender offer, *Mesa Petroleum Co. v. Aztec Oil & Gas Co.,* 406 F.Supp. 910, 917 (N.D. Tex. 1976); a government contract set-aside dispute, *Ellsworth Assocs. v. U.S.,* 917 F. Supp. 841 (D.D.C. 1996); a disappointed bidder lawsuit on a federal contract, *Optic-Electronic Corp. v. United States*, 683 F.Supp. 269 (D.D.C. 1987); a Federal Trade Commission deceptive practices action involving art prints, *FTC v. Magui Publishers, Inc.,* 1993 U.S. App. LEXIS 28684 ( D.Cal 1991). As to *Quilling v. Funding Res. Group*, 227 F.3d 213 (5th Cir. 2000), Amalgamated fails to inform the Court that the district court was enforcing a contempt order against defendant in an SEC enforcement action and ordered discovery only after the defendant failed to make payments required by an agreed order. *Quilling*, 227 F.3d at 233. Thus the PSLRA stay was not involved. In *SEC v. Int'l Loan Network, Inc.,* 770 F.Supp. 678 (D.D.C. 1991), *aff'd,* 968 F.2d 1304 (D.C.Cir. 1992), the SEC was granted a preliminary injunction freezing assets of a pyramid scheme involving investment memberships; no discovery was apparently granted. In *SEC v. Sterns*, 1991 U.S. Dist. LEXIS 13968 (D. Cal. 1991), the Court required *post-judgment* accounting by defendants within 60 days after entry of judgment. These cases in no way support Amalgamated's demand for *pre-judgment asset discovery.*

should be summarily denied. Because the request for lift of discovery stay is the last component of Amalgamated's Application for Temporary Restraining Order, Accounting, and Discovery, the Application is now ripe for dismissal.

Ms. Mark-Jusbasche respectfully requests that Amalgamated's request for expedited discovery be denied.

WHEREFORE, PREMISES CONSIDERED, Rebecca Mark-Jusbasche respectfully requests that the Court deny Amalgamated Bank's Application for Temporary Restraining Order, Accounting, and Discovery, as well as Amalgamated's request that the Court lift the statutory discovery stay imposed by the PSLRA, and that she have such other and further relief to which she may be justly entitled.

Respectfully submitted,

GRAVES, DOUGHERTY, HEARON & MOODY
A Professional Corporation

By _____

John J. McKetta, III
State Bar No. 13711500
Federal ID No. 29895

Attorney in Charge

Helen Currie Foster
State Bar No. 24008379
Federal ID No. 29894
515 Congress Avenue, Suite 2300
P.O. Box 98
Austin, Texas 78767
(512) 480-5600
(512) 478-1976 Telecopy

ATTORNEYS FOR DEFENDANT REBECCA MARK-JUSBASCHE

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing has been delivered by United States Mail to counsel of record, as shown below, this 7th day of February, 2002.

John J. McKetta, III
Helen Currie Foster

## COUNSEL FOR PLAINTIFF(S)


Theodore C. Anderson
Kilgore & Kilgore, PLLC
3131 McKinney Avenue, LB-103
Dallas, Texas 75204-2471
214/969-9009
214/953-0133

James D. Baskin III
BASKIN LAW FIRM
919 Congress Avenue, Suite 1000
Austin, TX 78701
512/381-6300
512/322-9280 (fax)

Thomas E. Bilek
HOEFFNER, BILEK & EIDMAN, L.L.P.
440 Louisiana, Suite 720
Houston, TX 77002
713/227-7720
713/227-9404 (fax)

Jeffrey C. Block
BERMAN DEVALERIO PEASE
TABACCO BURT & PUCILLO
One Liberty Square
Boston, MA 02109
617/542-8300
617/542-1194 (fax)

Vincent Cappucci
ENTWISTLE & CAPPUCCI LLP
299 Park Avenue, 14th Floor
New York, NY 10171
212/894-7200
212/894-7272 (fax)

Steven E. Cauley
Cauley, Geller, Bowman and
Coates, LLP
P.O. Box 25438
Little Rock, Arkansas 72221-5438
501/312-8500
501/312-8505 (fax)

Martin Chitwood
CHITWOOD & HARLEY
2900 Promenade II
1230 Peachtree Street, N.E.
Atlanta, GA 30309
404/873-3900
404/876-4476 (fax)

Tom A. Cunningham
Richard J. Zook
John E. Chapoton, Jr.
CUNNINGHAM, DARLOW, ZOOK &
CHAPOTON LLP
Chase Tower
600 Travis Suite 1700
Houston, TX 77002
713/255-5500
713/659-4466 (fax)

Michael D. Donovan
DONOVAN SEARLES, LLC
1845 Walnut Street, Suite 1100
Philadelphia, PA 19103
215/732-6067
215/732-8060 (fax)

John G. Emerson, Jr.
THE EMERSON FIRM
830 Apollo Lane
Houston, TX 77058
281/488-8854
281/488-8867 (fax)

William Federman
FEDERMAN & SHERWOOD
2926 Maple Avenue, Suite 200
Dallas, TX 75201
214/696-1000
214/740-0112 (fax)

Richard M. Frankel
HACKERMAN FRANKEL & MANELA
1122 Bissonnet
Houston, TX 77005
713/528-2500
713/528-2509 (fax)

Paul J. Geller
CAULEY, GELLER, BOWMAN AND
COATES, LLP
2255 Glades Road, Suite 421A
Boca Raton, FL 33431
561/750-3000
561/750-3364 (fax)

Roger B. Greenberg
SCHWARTZ, JUNELL, CAMPBELL &
OATHOUT, LLP
Two Houston Center
909 Fannin, Suite 2000
Houston, TX 77010
713/752-0017
713/752-0327 (fax)

Sean F. Greenwood
ROBINS, CLOUD, GREENWOOD &
LUBEL, LLP
910 Travis, Suite 2020
Houston, TX 77002
713/650-1200
713/650-1400 (fax)

Gregory Sean Jez
George M. Fleming
FLEMING & ASSOCIATES, L.L.P.
1330 Post Oak Blvd., Suite 3030
Houston, TX 77056-3019
713/621-7944
713/621-9638 (fax)

Ronald J. Kormanik
SYDOW, KORMANIK & ECKERSON
1111 Bagby, Suite 4700
Houston, TX 77002
713/654-8100
713/752-2199 (fax)

Daniel W. Krasner
Jeffrey G. Smith
WOLF HALDENSTEIN ADLER
FREEMAN & HERZ, LLP
270 Madison Avenue
New York, NY 10016
212/545-4600
212/545-4653 (fax)

William S. Lerach
Helen J. Hodges
Byron S. Georgiou
MILBERG WEISS BERSHAD
HYNES & LERACH LLP
401 B Street, Suite 1700
San Diego, CA 92101-5050
619/231-1058
619/231-7423 (fax)

Sid Liebesman
GRANT & EISENHOFER, P.A.
1220 North Market Street, Suite 500
Wilmington, DE 19801
302/622-7000
302/622-7100 (fax)

Joseph A. McDermott, III
LAW OFFICE OF JOSEPH A. MCDERMOTT, III
3100 Richmond Avenue, Suite 403
Houston, TX 77098
713/527-9190
713/527-9633 (fax)

Charles R. Parker
HILL, PARKER & ROBERSON LLP
5300 Memorial Drive, Suite 700
Houston, TX 70007
713/868-5581
713/868-1275 (fax)

Jonathan M. Plasse
Ira A. Schochet
David J. Goldsmith
GOODKIND LABATON RUDOFF &
SUCHAROW, LLP
100 Park Avenue, 12th Floor
New York, NY 10017-5563
212/907-0700
212/818-0471 (fax)

Ira M. Press
KIRBY, MCINERNEY & SQUIRE, LLP
830 Third Avenue, 10th Floor
New York, NY 10022
212/371-6600
212/751-2540 (fax)

Michael J. Pucillo
BERMAN DEVALERIO PEASE TABACCO
BURT & PUCILLO
515 North Flagler Drive, Suite 1701
West Palm Beach, FL 33401
561/835-9400
561/835-0322 (fax)

Saul Roffe
SIROTA & SIROTA
110 Wall Street, 21st Floor
New York, NY 10005
212/425-9055
212/425-9093 (fax)

Thomas W. Sankey
SANKEY & LUCK, LLP
600 Travis Street, Suite 6200
Houston, TX 77002
713/224-1007
713/223-7737 (fax)

Sherrie R. Savett
Carole A. Broderick
Arthur Stock
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
215/875-3000
215/875-3053 (fax)

R. Paul Yetter
YETTER & WARDEN, LLP
600 Travis, Suite 3800
Houston, TX 77002
713/238-2000
713/238-2002 (fax)

## COUNSEL FOR DEFENDANTS

Michael P. Carroll
Sharon Katz
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, NY 10017
212/450-4000
212/450-4800 (fax)

James E. Coleman, Jr.
CARRINGTON, COLEMAN, SLOMAN &
BLUMENTHAL
200 Crescent Court, Suite 1500
Dallas, TX 75201
214/855-3000
214/855-1333 (fax)

Richard B. Drubel
BOIES SCHILLER & FLEXNER LLP
26 South Main Street
Hanover, NH 03755
603/643-9090
603/643-9010 (fax)

J. Clifford Gunter, III
BRACEWELL & PATTERSON, L.L.P.
South Tower, Pennzoil Place
711 Louisiana Street, Suite 2900
Houston, TX 77002-2781
713/223-2900
713/221-1212 (fax)

Rusty Hardin
RUSTY HARDIN & ASSOCIATES, P.C.
1201 Louisiana, Suite 3300
Houston, TX 77002
713/652-9000
713/652-9800 (fax)

## COUNSEL FOR DEFENDANTS (CONT'D)

Bruce Hiler
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Washington, DC 20004-1109
202/383-5300
202/383-5414 (fax)

Jeffrey W. Kilduff
O'MELVENY & MYERS LLP
1650 Tysons Blvd.
McLean, VA 22102
703/287-2402
703/287-2404 (fax)

Robert M. Kornreich
WOLF POPPER LLP
845 Third Avenue
New York, NY 10022
212/759-4600
212/486-2093 (fax)

Dr. Bonnee Linden
PRO SE
1226 West Broadway
P.O. Box 114
Hewlett, NY 11557
516/295-7906
516/295-1975 (fax)

David C. Mattax
Office of Attorney General
P.O. Box 12548
Austin, Texas 78711-2548
512/463-2018
512/477-2348 (fax)

Jack C. Nickens
NICKENS, LAWLESS & FLACK
2000 Louisiana, Suite 1800
Houston, TX 77002
713/654-7600
713/654-7690 (fax)

Kathy D. Patrick
GIBBS & BRUNS, L.L.P.
1100 Louisiana, Suite 5300
Houston, TX 7002
713/650-8805
713/750-0903 (fax)

Charles F. Richards, Jr.
Of Counsel
RICHARDS, LAYTON & FINGER, P.A.
One Rodney Square
P.O. Box 551
Wilmington, DE 19899
302/658-6541
302/658-6548 (fax)

Don R. Sampen
Illinois Assistant Attorney General
100 W. Randolph, 13th Floor
Chicago, Illinois 60601

Stephen Susman
SUSMAN GODFREY L.L.P.
1000 Louisiana Street, Suite 5100
Houston, TX 77002-5096
713/651-9366
713/653-7897 (fax)

Herbert Blake Tartt, Jr.
BEIRNE, MAYNARD & PARSONS
Allied Bank Tower, 24th Floor
1300 Post Oak Blvd.
Houston, TX 77056
713/623-0887
713/960-1527 (fax)

Ronald G. Woods
RONALD G. WOODS,
ATTORNEY AT LAW
6300 Memorial, Suite 1000
Houston, TX 77007
713/842-9600
713/864-8738 (fax)

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| MARK NEWBY, *et al.*, | § | |
| | § | |
| Plaintiffs, | § | |
| | § | |
| v. | § | Civil Action No. H-01-3624 |
| | § | Consolidated Lead Case |
| ENRON CORP., *et al.*, | § | |
| | § | |
| Defendants. | § | CLASS ACTION |

ORDER

Pending before the Court in the above referenced action is Amalgamated Bank's Supplemental Brief in Response to the Court's January 8, 2002 Memorandum and Order, requesting that the Court lift the Private Securities Litigation Reform Act discovery stay and require the individual defendants to respond to the discovery requests (Interrogatories and Expedited Requests for Production) attached as Exhibits 9 and 10 to the Supplemental Brief. The Court

ORDERS that the request for lift of stay and for the requested discovery is DENIED.

SIGNED at Houston, Texas, this ___ day of _____, 2002.

_____
MELINDA HARMON
UNITED STATES DISTRICT JUDGE